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May 29, 2007

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Opinion

Case Name: Personnel Security Hearing

Date of Filing: December 6, 2005

Case Number: TSO-0324

This Decision concerns the eligibility of XXXXXXXXXXXX (the individual) to hold an access authorization (also called a security clearance). A Department of Energy (DOE) Operations Office suspended the individual's access authorization under the provisions of 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This decision considers whether, on the basis of the evidence and testimony presented in this proceeding, the individual's access authorization should be restored. As set forth in this decision, I have determined that the individual's access authorization should be restored.

I. Background

The provisions of 10 C.F.R. Part 710 govern the eligibility of individuals who are employed by or are applicants for employment with DOE, contractors, agents, DOE access permittees, and other persons designated by the Secretary of Energy for access to classified matter or special nuclear material. Part 710 generally provides that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting or continuation of access authorization will not endanger the common defense and security and is clearly consistent with the national interest." 10 C.F.R. § 710.7(a).

The individual held a security clearance from 1996 until it was suspended in October 2005. During a routine reinvestigation in 2004, the local DOE security office (DOE Security) uncovered derogatory information that it was unable to resolve through a Personnel Security Interview (PSI). Consequently, it initiated formal administrative review proceedings. In a Notification Letter issued to the individual on October 28, 2005, DOE Security stated that it was unable to reinstate the individual's security clearance pending the resolution of certain

derogatory information that falls within the purview of two potential disqualifying criteria, Criteria K and L.¹

After receiving the Notification Letter, the individual exercised his right under Part 710 to request a hearing in this matter. 10 C.F.R. § 710.21(b). On December 14, 2005, the Director of the Office of Hearings and Appeals appointed me the hearing officer in this case. After conferring with the individual and the appointed DOE Counsel, 10 C.F.R. § 710.24, I established a hearing date. At the hearing, the individual testified on his own behalf, and called as witnesses a forensic psychologist, his treating psychiatrist, and three friends and co-workers. The transcript of the hearing will be hereinafter cited as “Tr.” The LSO submitted 19 exhibits into the record; these will be cited in this decision by their exhibit number. The individual submitted into the record letters of support from 20 friends and co-workers.

II. Standard of Review

The Hearing Officer’s role in this proceeding is to evaluate the evidence presented by the agency and the individual, and to render a decision based on that evidence. *See* 10 C.F.R. § 710.27(a). Part 710 generally provides that “[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting or continuation of access authorization will not endanger the common defense and security and is clearly consistent with the national interest. Any doubt as to the individual’s access authorization eligibility shall be resolved in favor of national security.” 10 C.F.R. § 710.7(a). I have considered the following factors in rendering this decision: the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct; the individual’s age and maturity at the time of the conduct; the voluntariness of the individual’s participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuance or recurrence; and other relevant factors. *See* 10 C.F.R. §§ 710.7(c), 710.27(a). The discussion below reflects my application of these factors to the testimony and evidence presented by both sides in this case.

III. Findings of Fact

The individual used marijuana at various times in his adult life when he was a student. Due to his history of drug use, when he was offered a security clearance in 1996, he was asked to sign a DOE Drug Certification form, in which he acknowledged the department’s policy regarding illegal drug use, including his understanding that future illegal use of controlled substances could result in the loss of his security clearance. Beginning in September 2000 the individual took a

¹ Criterion K relates to information that a person “possessed, used, or experimented with a drug or other substance listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances act of 1970 (such as marijuana, cocaine, amphetamines, barbiturates, narcotics, etc.) except as prescribed or administered by a physician licensed to dispense drugs in the practice of medicine, or as otherwise authorized by Federal law.” Criterion L relates, in relevant part, to information that a person “[e]ngaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security. . . .” 10 C.F.R. § 710.8(l).

one-year leave of absence from his position. During that time, he cared for his dying father and explored new career possibilities. While he was on leave, he used marijuana 10 to 20 times. Although he was aware that he continued to hold his security clearance, he had no intention to return to his former position at the end of his leave. Ultimately, however, he did return to his former position, and duly reported his marijuana use to DOE Security when it conducted its routine reinvestigation of his eligibility for access authorization, in late 2003 and early 2004. The individual's use of marijuana while holding a security clearance, despite his understanding that such use is contrary to DOE policy as well as federal law, constitutes the derogatory information that DOE Security believed raised significant national security concerns.

IV. Analysis

I have thoroughly considered the record of this proceeding, including the submissions tendered in this case and the testimony of the witnesses presented at the hearing. After due deliberation, I have determined that the individual's access authorization should be restored. I find that such a restoration would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings I make in support of this decision are discussed below.

A. Criterion K

1. The Allegations and Associated Security Concerns

To support its concerns under Criterion K, DOE Security alleges in its Notification Letter that the individual used and purchased marijuana in small amounts as a student and during his 2000-2001 leave of absence. At a PSI conducted in 1996, the individual revealed that he smoked marijuana in varying amounts from 1977 to 1988 and infrequently from 1990 to 1993 or 1994, and purchased a total of one-half ounce of marijuana in 1978 and 1979. DOE Exhibit (Exh.) 4 at 7-23, 25-26. During a second PSI, conducted in 2005, the individual admitted that he used marijuana about 20 times during his leave of absence and purchased one-quarter ounce of marijuana one time during the same period. Exh. 3 at 23-24.

The security concerns surrounding the use of illegal drugs are twofold. First, when an individual is under the influence of illegal drugs, his judgment may be impaired, which in turn might cause him not to properly safeguard classified materials. Second, using illegal drugs is a violation of law and may indicate a willingness to disregard other laws and rules, including those pertaining to the safeguarding of classified materials. *See Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* issued by the Assistant to the President for National Security Affairs, The White House (December 29, 2005) (Adjudicative Guidelines) at Guideline H(24). In this case, I find that the individual's history of illegal drug use raises questions about his reliability, trustworthiness and willingness to comply with laws, rules and regulations. For this reason, I find that DOE Security properly invoked Criterion K as a basis for suspending the individual's access authorization.

2. Mitigating Evidence Regarding Criterion K Allegations

The individual presented himself at the hearing as extremely honest and straightforward. In my opinion, there is no question concerning his credibility, and even though most of the evidence concerning the individual's use of marijuana is his own testimony, I am inclined to give considerable weight to it.

He testified at the hearing that he never used marijuana at any time while he was working at the DOE facility. He freely admitted that he used and purchased marijuana during his leave of absence, but stopped using it before he returned to work at the facility. Tr. at 17. This pattern of use corresponds to what he reported at his 1996 PSI—that he stopped using marijuana in 1994 when he first submitted his documentation for access authorization. Exh. 4 at 24 (1996 PSI). He reported that he had no difficulty stopping when, in both cases, he determined that he must do so to have the security clearance he needed for his work. Tr. at 18.

The individual acknowledged that when he used marijuana while on leave, he was aware that he was holding a security clearance and that he had signed a drug certification, in which he acknowledged that such use was contrary to DOE policy and could lead to the removal of his clearance. He explained that at the time he used the marijuana, he had no intention to return to his job at the DOE facility, but rather planned to pursue a new career in writing, for which no access authorization would be needed. Tr. at 17.

The individual's treating psychiatrist and a forensic psychologist each provided additional mitigating evidence. The treating psychiatrist testified that the individual was at minimal risk for using marijuana in the future. Tr. at 98. He enumerated the factors that led him to this conclusion, derived from his observations of the individual during the course of their three-year-long professional relationship. He stated that in his opinion the individual had used marijuana in the past to deal with grief and to evoke memories of his pleasant college years. Tr. at 93. The individual's most recent marijuana use, while on leave in 2000-2001, occurred during a period when he was grieving for his father and at the same time engaged in an unsettling search for a new career path. Tr. at 94. The psychiatrist stated that the individual reported discovering during that time that marijuana did not provide the comfort and enjoyment it had in the past, and that the individual was now convinced that using marijuana was a mistake and would hinder rather than help him achieve what is important in his life: his work and his personal relationships. Tr. at 95. The psychiatrist also testified that the individual appears to have exchanged marijuana for other tools that will assist him in exploring personal issues: sessions with his psychiatrist, discussions with his men's group, sharing with close friends. Tr. at 98. The psychiatrist also pointed out that the individual had experienced a great deal of stress in the past year, particularly regarding health issues, and had not resorted to using marijuana. Tr. at 103. He concluded that, in his professional opinion, the individual is not now a user of illegal drugs in need of rehabilitation. Tr. at 99.

The forensic psychologist, with whom the individual has no formal relationship, conducted an evaluation at the request of the individual's attorney. He interviewed the individual, administered psychometric tests, and formed diagnostic impressions of the individual based on that interview and the test results. Two conclusions he reached have a bearing on this case. The

first is that the individual is not the sort of person about whose honesty and reliability we should be concerned. According to the psychologist, “there are known psychological conditions which can be evaluated psychometrically which would predispose a person to be dishonest, untrustworthy and unreliable,” and he stated that the individual “showed no signs on the testing of the kind of underlying characterological problems which would suggest that he would behave in the future in a dishonest, unreliable and untrustworthy way.” Tr. at 112. The second is that the individual is not likely to use illegal drugs in the future. The psychologist pointed out that in 2000, when the individual was using marijuana, an additional stressor at the time was learning that the first round of treatment of a medical condition had been ineffective. Tr. at 117. He also testified that the year leading up to this hearing had been a difficult year as well for the individual, and “there was no indication whatsoever that [the individual] wanted to turn to marijuana as a way of alleviating his stress.” Tr. at 121. He explained that he administered a test to the individual that is used to determine addiction proneness, and the individual “showed no such proneness.” Tr. at 123. The psychologist concluded,

I think the probability of him ever using an illegal drug is extremely low. With the understanding that predicting the future is risky business, but relying upon what we’ve seen over this period of time, after all, this is now five years, and the last one being a particularly difficult one, I think we’re on pretty firm ground in prognosticating that we’re not likely to see that sort of behavior again.

Tr. at 121.

3. Hearing Officer’s Evaluation of Criterion K Evidence

The evidence regarding the individual’s use of marijuana consistently supports a finding that it was limited to two periods in his life. The first period consists of his student years: moderate use in his first year of college, tapering off to occasional use by the time he graduated in 1982, and occasional use again in 1984 to 1986 during his first two years of graduate school, with some periods of no use at all. Exh. 4 at 7-24. For the years 1982 to 1984 and 1986 to 1993, he reported sporadic use, once or twice a year. He reported that he stopped using marijuana altogether in 1993, when he first applied for access authorization. The second period was during a leave of absence from the DOE facility in 2000-2001. The evidence also shows that after his freshman year of college, the individual used marijuana in social settings and in small amounts. In addition, he did not smoke marijuana when he was under consideration for, or holding, access authorization. The one exception to this was when he was on his leave of absence: he did use marijuana then, and he was aware that he was still holding access authorization. He does not seek to excuse his behavior, but states that he was no longer working at the facility, and he had no intention of returning to the facility after his leave expired because he was considering pursuing a new career. Once he determined that he would in fact be returning to the position for which he held a security clearance, he again stopped using marijuana, as he had in 1994.

During the hearing, the individual enumerated a number of facts that demonstrate that his relationship to marijuana has changed significantly since his last involvement with it during his leave of absence. During his leave he came to the realization that marijuana did not help him be “a better writer [or] a better guitar player.” Tr. at 35. While he initially considered his security

clearance merely a means to get to his work location, he now understands that the security program is built on trust and he takes the requirements of the program seriously. Tr. at 32-33. He now has structures in place, including a psychiatrist and a men's group, which have given him the support to deal with personal stress without resorting to marijuana. Among the recent causes of stress, serious health issues and the strain of the current administrative review process figure prominently, and he has not turned to marijuana despite these stressors. Tr. at 34, 46-47. In fact, at one point in his recent medical treatment, he was offered THC, the active ingredient in marijuana, to combat his pain, and he refused it. Tr. at 28. The testimony of the mental health professionals who appeared at the hearing confirms the individual's testimony.

The individual's use of marijuana, while not isolated, appears to me to be relegated to the past. There is no evidence that the individual currently abuses the drug, and to the contrary, there is medical testimony that the individual is not prone to addiction by nature. By all reports, at the time of the hearing, he had not used marijuana in nearly five years. His historical pattern of marijuana use from 1977 to 1993 was sporadic and generally limited to his student years: a year of moderate use as a freshman, followed by roughly six non-consecutive years of occasional use, and nine years during which he used marijuana twice, once, or not at all. Aside from the year 2000-2001, his marijuana use tapered off over the years and stopped entirely in 1993. As for his most recent period of use, a number of factors contributed to his resuming marijuana use: his father's death, his decision not to return to his current job, his searching for a new profession. It is clear that he had determined that he would no longer resume his position and made an uncharacteristically ill-conceived error in judgment when he decided he could use marijuana under those circumstances. He has demonstrated that he has no intention to resume smoking marijuana, and has mechanisms in place to confront and manage the significant stresses in his life. He has further demonstrated that he now has a deeper respect and understanding for the security program than he had during his leave of absence. After considering all of the above factors, I find it highly unlikely that the individual will use marijuana in the future. This conclusion mitigates the DOE's concern that the individual's judgment with respect to handling classified materials in the future could be impaired while he was under the influence of marijuana.

Use of illegal drugs raises an additional concern under Criterion K in that the activity is a violation of law and may indicate the individual's proclivity to disregard other laws and rules, particularly those related to the handling of classified materials. While any prior illegal drug use rightly raises this concern, I see no evidence in the present case that the individual's disregard for drug laws is indicative of a pattern in his life of disregard for other laws. To the contrary, my impression of the individual, based on a common-sense assessment of all the evidence before me, is that he is a responsible, straightforward, law-abiding citizen, who has placed his prior involvement with marijuana behind him.

It is my opinion that the individual has mitigated the national security concerns that his historical use of marijuana raised under Criterion K.

B. Criterion L

1. The Allegations and Associated Security Concerns

DOE Security alleges in its Notification Letter that the individual used and purchased marijuana during his 2000-2001 leave of absence even though he understood that such behavior was contrary to DOE regulations. DOE Security produced copies of four DOE Security Acknowledgments ranging from 1993 through 2004 that the individual had signed. Exhs. 10-13. Each contains language that informs the signer that involvement with illegal drugs could result in the loss of his access authorization. In addition, the individual signed a Drug Certification form in 1996 in which he agreed not to use or purchase illegal drugs while holding a security clearance. Exh. 9. During the 2005 PSI, the individual admitted that he used and purchased marijuana during his leave of absence and acknowledged his awareness of the policies and regulations prohibiting involvement with illegal drugs. Exh. 3 at 12, 23-24, 28, 42-44.

The security concerns under Criterion L surrounding the individual's behavior during his leave of absence relate to his knowing violation of DOE rules and regulations and his violations of his commitment to refrain from illegal drug use. Such behavior can raise questions about the individual's reliability, trustworthiness and ability to protect classified information. *See* Adjudicative Guidelines at Guideline E(15). In this case, I find that the individual's knowing violations of a personal commitment as well as established rules and regulations raises questions about his reliability, trustworthiness and willingness to comply with laws, rules and regulations. For this reason, I find that DOE Security properly invoked Criterion L as a basis for suspending the individual's access authorization.²

2. Mitigating Evidence Regarding Criterion L Allegations

As discussed above, the individual has impressed me as a very straightforward, honest person. All derogatory information that has raised security concerns was provided to DOE Security by the individual himself. He has not provided conflicting facts, and has been consistent in his recollection of details such as dates in the distant past. My impression of the individual's general truthfulness and reliability is supported by the testimony of both his treating psychiatrist, who expressed his opinion that the individual is by nature honest, forthright, responsible and not deceptive, Tr. at 85, 92, 102, and the forensic psychologist, whose interpretation of psychometric test results led him to similar conclusions. Tr. at 111.

In his testimony, the individual admitted that he smoked marijuana during his leave of absence, even though he was aware that such use was not only illegal but also contrary to DOE security rules and regulations. The individual explained his frame of mind when he began using marijuana shortly after his father's death: "I was pretty upset and pretty lost. . . . [M]y father had always kind of been an anchor, and now he was gone, and I didn't really feel the connection with my old job, and I had these . . . ideas of becoming a writer, but they were rather ill-formed and in some sense scary to me to try and pursue that route." Tr. at 16-17. After confirming that

² The Notification Letter does not specifically address the fact that marijuana use constitutes criminal activity, which as such raises an additional concern under Criterion L. To the extent that criminal activity may reflect a willingness to disobey other laws and rules, I have addressed this concern in Section A.3 above.

he was aware that he held a security clearance and had signed a commitment not to use illegal drugs, he was asked:

Q. So how did you reconcile that – or did you reconcile that in your mind?

A. I didn't really reconcile it.

Q. Why not?

A. It wasn't . . . an issue. . . . [The facility] was very distant to me at that point, and while I could say . . . now that I knew I had my security clearance, then the notion that I had the clearance was not really relevant in some ways. I had no intention of going back to [the facility].

Tr. at 17-18. As stated above, toward the end of his leave of absence, the individual changed his mind and determined that he would return to his former position. At that juncture, he stopped using marijuana. Tr. at 18.

3. Hearing Officer's Evaluation of Criterion L Evidence

Many Criterion L cases revolve around deliberate misrepresentation of facts to the LSO. Such activity raises a serious security concern under Criterion L, because DOE Security cannot be confident that the individual is providing it with reliable information about his or her activities or will provide reliable information in the future. *See* Adjudicative Guidelines at Guideline E(15) ("Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.") Misrepresentation is not an issue, however, in the present case. It is clear to me from the individual's testimony, from his personnel security interviews, from the documents he provided to the LSO, and from the testimony of the mental health professionals who appeared at the hearing that the individual has not attempted to minimize his illegal drug use or in any other manner misrepresent his involvement with marijuana.

The security concern in this case, nevertheless, is not insignificant. The individual freely admits that he smoked marijuana on a limited number of occasions during his leave of absence in 2000-2001. He also freely admits that he recognized, at the time, that he was holding a security clearance, was prohibited from smoking marijuana by law and by DOE rules and regulations and, furthermore, had made a commitment to the DOE in his Drug Certification form not to use illegal drugs while holding a security clearance. From his testimony, I am thoroughly convinced that he put his job behind him as he embarked upon a quest to redesign his life. In doing so, however, he failed to pay adequate attention to the fact that he continued to hold a security clearance while he was far removed from his work, both physically and mentally. He exercised poor judgment in using marijuana under these circumstances. Moreover, breaching his commitment to the DOE constitutes evidence that he was not reliable or trustworthy.

I am further convinced, however, that he will not repeat the behavior in the future, for a number of reasons. His father's death, the failure of a course of treatment for a serious health condition,

his dissatisfaction with his current job, and his uncertainty about a career change all contributed a great deal of stress to life at the time of his leave of absence. An additional factor was his frame of mind at the time: he was not working at or even entering the facility, he was not drawing a salary, and he had determined that he would not return. This physical and psychological distance from the work that necessitated his security clearance contributed to a unique set of circumstances that are highly unlikely to recur. The record before me shows that he has resolved those stresses he faced during his leave of absence and, more important, now has support systems in place to assist him in addressing future life stresses in a responsible and more effective manner. The record also demonstrates that the individual has faced serious stresses, in the form of health-related issues, in the past five years, and no longer employs poor judgment by resorting to marijuana to deal with them.

Moreover, I believe that the individual's exercise of poor judgment is isolated not only by circumstances but also by nature. My assessment of the individual is that the poor judgment he employed during his leave of absence is not characteristic of his general nature, which is cautious, reflective and reliable. The record supports this assessment, through the testimony of the mental health professionals, his supervisor, a co-worker, and a close friend, as well as numerous letters praising his character. Tr. at 92, 111 (professionals), 60-63 (supervisor), 68 (co-worker), 76-81 (friend); Individual's 2/21/2006 submission. To the contrary, I see no evidence in the record that the individual has employed poor judgment or exhibited untrustworthy behavior in any other aspects of his life. After considering all of the above factors, I find that it is highly unlikely that the individual will exercise in the future the poor judgment and unreliability he revealed by using marijuana while holding a security clearance. It is my opinion that the individual has mitigated the national security concerns that DOE Security has raised under Criterion L.

V. Conclusion

As explained in this Decision, I find that DOE Security properly invoked 10 C.F.R. § 710.8(k) and (l) in determining that it could not reinstate the individual's access authorization without resolving concerns raised by derogatory information it received regarding the individual. For the reasons I have described above, I find that the individual has sufficiently mitigated the security concerns raised under Criteria K and L. I therefore find that restoring the individual's access authorization would not endanger the common defense and security and would be consistent with the national interest. Accordingly, I have determined that the individual's access authorization should be restored.

William M. Schwartz
Hearing Officer
Office of Hearings and Appeals

Date: May 29, 2007